

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Review Case No. 307/2007

REX

Vs

NGUBANE MAGAGULA

Coram: S.B. MAPHALALA - J

For the Crown: MISS Q. ZWANE

For the Accused: IN PERSON

REASONS FOR SENTENCE

13th March 2008

[1] The accused appeared before Senior Magistrate Mr. H. Khumalo charged with the offence of rape and was accordingly convicted. It was alleged that upon or about the 10th July 2007, and at or near Nyakatfo area in the Hhohho Region the said accused did wrongfully and intentionally had unlawful sexual intercourse with P M without her consent and did there upon commit the crime of rape.

[2] The Crown further alleges that the rape is accompanied by aggravating circumstances as envisaged by Section 185 bis of the Criminal Procedure and Evidence Act No. 67 of 1938 as follows:

- (a) The victim was a minor of very tender age;
- (b) At the time of the commission of the offence the accused did not use a condom thereby putting the complainant at risk of contracting sexual transmitted diseases especially HIV/Aids.

[3] The learned Senior Magistrate has remitted this case to this court within the requirements of Section 292 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938 (as amended) for sentence. The said Section provides that if on the trial by a Magistrate's Court any person is convicted of an offence, the court, on obtaining information about his character and antecedents, is of the opinion that they are such that a greater punishment should be inflicted for the offence than it has the power to inflict, such court may, for reasons to be recorded in writing on record of the case, instead of dealing with him in any other manner, commit him in custody to the High Court for sentence.

[4] The matter appeared before this court on the 5 March 2008, where I heard factors in mitigation of sentence from the bar. The following facts were disclosed by the accused;

- (i) He is 40 years old;
- (ii) He has a wife with (five) 5 children;
- (iii) He was an occasional cane cutter and he asked the court to be lenient because he did not intend to do what he did.

[5] According to Winston Churchill in "*Fox English Prisons and Borstal Systems*" (1952):

"The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of civilization of any country. A calm and dispassionate recognition of the rights of the accused against the state, and even convicted criminals against the state, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man - these are symbols which in the treatment of crime and criminals mark and measure the store-up strength of a nation, and are the sign and proof of the living virtue in it".

[6] See also the Supreme Court cases in *Thumbela P. Mhlanga — Appeal Case No. 26/2003, Rex vs Kenneth Maseko - Appeal Case No. 7/2004; Nicholas Magagula vs Rex -Appeal Case No. 13/2004* and that of *Lawrence Phuphutha Manana - Criminal Appeal Case No. 733/2004* on the range of sentences to be imposed in cases of rape.

[7] Having considered all the factors in the *triad* I have come to the conclusion that in the present case the interest of the accused will have to be subservient to the interest of the society. Young children are entitled to their play and it is not for scavengers like you to pounce on. They need to be protected. The only protection against your sort is to impose sentences to discourage others who might be lurking in the dark aspiring to satisfy their lust on young children. Accused failed to use protective measures before raping complainant hence putting complainant to a risk of contracting venereal diseases including HIV/Aids.

[8] In the circumstances of this case, it is my considered view that a sentence of 18 years will be appropriate and will send the right message to would-be offenders. The sentence is backdated to the date of arrest of the accused.

S.B. MAPHALALA

JUDGE